

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Entertainment—Advance/Newhouse Partnership)	CSR-6927-E
)	
For Determination of Effective Competition)	
In Wilson, North Carolina (NC0110))	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2007

Released: March 5, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a petition for special relief that Time Warner Entertainment – Advance/Newhouse Partnership d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that such operators are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation in the community, as listed in Attachment A. The City of Wilson, North Carolina (“Wilson”) filed an opposition, and Time Warner filed a Reply.

II. BACKGROUND

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(1); 47 C.F.R. § 76.905.

⁵ See 47 C.F.R. §§ 76.906 & 907.

III. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition under the “competitive provider” test if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁶

4. Under the first prong of the competing provider test, Time Warner must show that the franchise area is served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Because the Commission has repeatedly held that DBS is technically available and physically able to provide service, states Time Warner, DBS is presumably “offered” in the franchise community.⁷ Similarly, Time Warner argues that consumers in the franchise area are reasonably aware of the availability of DBS service because of the “extensive nationwide DBS Service Providers’ subscribership and growth in recent years, combined with a local DTH penetration of more than 15 percent”⁸ Finally, Time Warner asserts that DBS provides programming service comparable to services offered by Time Warner.⁹ Thus, according to Time Warner, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.¹⁰ Time Warner asserts that it is the largest MVPD in Wilson because Time Warner’s subscribership exceeds the aggregate DBS subscribership in the franchise areas.¹¹ Time Warner calculates DBS subscribership in the franchise area based on 2000 Census household data and a Satellite Broadcasting and Communications Association (“SBCA”) Effective Competition Tracking Report reflecting the number of DBS subscribers within the specified ZIP codes associated with the cable communities.¹² Because areas covered by the 5-digit ZIP codes exceed the actual franchise area, however, Time Warner used an allocation figure to proportionally reduce the SBCA subscribership figure.¹³ Based on these figures, Time Warner alleges that DBS subscribership in Wilson is 16.51 percent.¹⁴

⁶ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See id.* at 3. To reinforce its argument as to availability, Time Warner emphasizes that there are no regulatory, technical or other impediments to households receiving DBS service. *See id.* (emphasizing that under Section 207 of the Telecommunications Act, as amended, and the Section 25.104 of the Commission’s rules, local authorities may not enact or enforce zoning restrictions that prevents installation of a dish).

⁸ *See id.* at 5 (citing *Adelphia Communications*, 20 FCC Rcd. 7503, 7504 (2005)).

⁹ *See id.* at 3. Under the rules, comparable programming is offered by any multichannel video programmer distributor able to offer “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.” *See* Petition at 6 (quoting 47 C.F.R. § 76.905 (g)).

¹⁰ 47 U.S.C. §76. 905(e).

¹¹ *See* Petition at 7.

¹² *See id.* at Exhibit D.

¹³ *See id.* at 8.

¹⁴ *See id.*

6. In opposition, Wilson argues that Time Warner fails to provide sufficient evidence to satisfy either prong of the competing provider test.¹⁵ Under the first prong, Wilson contends that Time Warner fails to show that residents of Wilson are “reasonably aware” of the availability of competitive DBS service because Time Warner did not prove that DBS advertising actually “reach [es] the community in question” without having to be “actively sought out.”¹⁶ Wilson also asserts that Time Warner’s DBS penetration is erroneous.¹⁷ Wilson used utility records to supply SBCA with ZIP code plus four (“ZIP+4”) data for determination of DBS subscribership in the franchise area. The penetration rate reported by Time Warner (16.51 percent) is significantly higher than the penetration rate calculated by Wilson based on the ZIP+4 data (13.51 percent).¹⁸

7. In reply, Time Warner argues that because 16.51 percent of the total households in Wilson subscribe to DBS service, Wilson residents “are obviously aware” of the availability of DBS service.¹⁹ Time Warner further argues that in light of extensive nationwide DBS subscribership and growth, as well as DBS’s local, regional, and national marketing efforts, households within the franchise area must be aware of the availability of DBS.²⁰ In support of its claim, Time Warner provides evidence of DBS advertisements in Wilson newspapers.²¹

8. Time Warner also argues that because it has presented a reasonable and approved method of calculating DBS penetration, the burden of proof shifts to Wilson to rebut Time Warner’s evidence. Wilson fails to rebut this evidence, according to Time Warner, because Wilson’s ZIP+4 codes were subjectively sorted.²² Time Warner also emphasizes that Wilson did not provide the ZIP+4 codes submitted to SBCA, thereby making it impossible to verify that overlapping ZIP codes were included.²³ In light of these issues, Time Warner argues that Wilson failed to rebut Time Warner’s penetration figure.

9. Wilson appended the record by filing a supplement to its opposition. In this supplement, Wilson argues that Time Warner’s offering of 4 advertisements from 3 newspapers is insufficient to show that Wilson residents are “reasonably aware” of the availability of DBS. Wilson emphasizes that only one of the papers was local and that the one advertisement therein was generic and national. Furthermore, asserts Wilson, this advertisement reached only 13-16 percent of the households in the area.²⁴ Wilson also emphasizes that its ZIP+4 data submitted to SBCA was derived from Wilson’s current utilities bills for electric, gas, water, sewer and storm water usage²⁵ as sorted by a “programmer/analyst . . .

¹⁵ See Opposition at 3.

¹⁶ See *id.* (quoting *Implementation of Section of the Cable Television Consumer Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631, 5660 ¶32 (1993)).

¹⁷ See *id.* at 4.

¹⁸ See *id.*

¹⁹ See Reply at 2.

²⁰ See *id.* at 3.

²¹ See *id.*

²² See *id.* at 5. Time Warner argues that undisclosed information is missing the following explanations: 1) how the list is exhaustive 2) the degree of margin of error approximating how closely this list matches all possible ZIP+4 codes 3) the sorting methodology and 4) verification procedures. See *id.*

²³ See *id.* at 6.

²⁴ See Supplement to Opposition at 2-3. Wilson emphasized that one generic advertisement had a service number for a satellite service in Miami, Florida; another paper did not distribute its paper in Wilson; and national, generic DishTV ad listing service centers in New York City and West Texas were the only truly local ads. See *id.*

²⁵ See *id.* at 4.

responsible for program coding and report generation for the City of Wilson on this very same data.”²⁶ In addition, Wilson submits a Declaration by a cable consultant hired by Wilson to oppose the Time Warner petition wherein the consultant avers that he compared Wilson’s ZIP+4 data with a Wilson GIS map to confirm all ZIP codes were located within the City’s franchise area.²⁷ Finally, Wilson submits an email from the City of Wilson, Manager of Information Technology Services, detailing that the selection criteria used was “active residential customers, inside the city limits, no P.O. boxes.”²⁸

10. With respect to the first prong of the competing provider test, the Commission agrees with Time Warner that residents of Wilson are reasonably aware of the availability of DBS service. We find that the DBS service of DirecTV Inc. ("DirecTV") and DISH Network ("Dish") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.²⁹ Subscribership to DirecTV Inc. ("DirecTV") and DISH Network ("Dish") reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.³⁰ The Commission has held that a party may use evidence of penetration rates in the franchise area coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.³¹ In light of the evidence of DBS subscribership, discussed below, we believe that residents of Wilson are reasonably aware that DBS service is available.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.* at Exhibit 2.

²⁹ *See* MediaOne of Georgia, 12 FCC Rcd 19406 (1997).

³⁰ *See Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd. 2503, 2540-41 (MB 2006).

³¹ *See e.g. MCC Iowa, LLC & Mediacom Iowa, LLC, Petition for Effective Competition in Various Local Franchise Areas*, 21 FCC Rcd. 3457, 3458 (2006); *Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd. 1175 (2006).

11. With respect to the second prong of the competing provider test, we determine that Wilson has rebutted the presumption that Time Warner's figures are valid. Because the Commission has not expressed a preference for ZIP+4 data over 5-digit ZIP code data, the established methodology used by Time Warner creates a rebuttable presumption of validity. In the absence of contrary evidence, the Commission has accepted estimates calculated using the methodology employed by Time Warner in this case to show penetration rates in franchise areas.³² The ZIP+4 data supplied to SBCA and eventually, to the Commission and the parties,³³ however, enable a franchise-specific compilation of DBS penetration.³⁴ Therefore, in the absence of error, ZIP+4 data will rebut an estimate premised on five digit ZIP code data.

12. Although Time Warner alleges several errors in the selection of ZIP codes for inclusion into the SBCA data, Time Warner did not demonstrate with any specificity that the ZIP+4 data submitted to SBCA was inherently flawed. Wilson, however, presented evidence to show the validity of its figures by presenting evidence of the sorter's qualifications and the recent generation of ZIP code figures based on objective criteria. In light of this evidence, and because Wilson's figures show that the penetration rate in Wilson does not exceed 15 percent (*see* Attachment A), Time Warner has failed to show that it is subject to effective competition.

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the petition filed by Time Warner Entertainment—Advance/Newhouse Partnership for a determination of effective competition in Wilson **IS DENIED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

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³² See e.g. *Charter Communications, Inc. on behalf of Falcon Cable Media, a California Limited Partnership; Charter Communications VI, LLC; and Interlink Communications Partners, LLC, Petition for Determination of Effective Competition in Eight Virginia Communities*, 19 FCC Rcd 6878 (2004); *Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable, Petition for Effective Competition in Thirty-Eight Communities in South Carolina*, 21 FCC Rcd. 26937 (2006).

³³ See Supplement to Opposition, Exhibit 2: Wilson E-mail (source of ZIP+4 list), ZIP+4 List, and SBCA Satellite Subscriber Data.

³⁴ See e.g. *Falcon Cable Company, Petition for Effective Competition in Twelve Oregon Communities*, 17 FCC Rcd 4648 (2002); *Marcus Cable Associates, LLC d/b/a Charter Communications, Inc.*, 17 FCC Rcd 16652 (2002), *aff'd* 18 FCC Rcd 9649 (2003); *Vicksburg Video, Inc d/b/a Wehco Video, Inc. Petition for Determination of Effective Competition in Vicksburg, MS.*, 17 FCC Rcd 16659 (2002).

³⁵ 47 C.F.R. § 0.283.

Attachment A

Cable Operator Not Subject to Competing Provider Effective Competition

Community	CUID	CPR*	2000 Census Households⁺	DBS Subscribers⁺
Wilson, North Carolina	NC0110	13.51%	17,296	2337

CPR= Percent DBS penetration

+ = See Wilson Petition